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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1694

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

—v.—

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRIEF OF AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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IN THE

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OCTOBER TERM, 1972

No. 71-1694

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

—v.—

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRIEF OF AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

Interest of *Amicus*[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of 180,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that discrimination against women permeates society at every level, and is often reinforced by governmental action, the American Civil Liberties Union

[1] This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

has established a Women's Rights Project to work toward the elimination of sex-based discrimination. *Amicus* believes that this case, concerning the rights of married servicewomen to the same fringe benefits as those given married servicemen, poses a constitutional issue of great significance to the achievement of full equality under the law between the sexes.

Opinion Below

The opinion of the United States District Court for the Middle District of Alabama, Northern Division, is reported at 341 F. Supp. 201 (1972). It is also set out in the Appendix to the Jurisdictional Statement (J.S. at 1a-21a).[1]

Jurisdiction

On April 5, 1972, the United States District Court for the Middle District of Alabama, Northern Division, sitting as a three-judge court, entered the judgment which is the subject of this appeal. Notice of Appeal to the Supreme Court of the United States was filed in the United States District Court for the Middle District of Alabama, Northern Division, on April 26, 1972 (J.S. at 22a). The Jurisdictional Statement was filed on June 26, 1972, and probable jurisdiction was noted on October 10, 1972.

The jurisdiction of the Supreme Court to review this decision of the United States District Court on appeal is conferred by Title 28 U.S.C. Section 1253. The following deci-

[1] References to the Jurisdictional Statement are designated herein by the abbreviation "J.S.".

sions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

Statutes and Regulations Involved

Title 37 U.S.C. Sections 401 and 403, Title 10 U.S.C. Sections 1072 and 1076, and Department of Defense Military Pay and Allowance Entitlements Manual, Sec. 30242, are set out in the Jurisdictional Statement at 23a *et seq.*

Question Presented

Whether the classification according to sex made by 37 U.S.C. Sections 401 and 403, and 10 U.S.C. Sections 1072 and 1076, which provide "dependency" allowances automatically for the spouse of male members of the uniformed services, whether or not the spouse is in fact dependent on the member for any of her support, but which provide such allowances for the spouse of female members of the uniformed services only upon a showing that the spouse is in fact dependent on the member for more than one-half of his support, violates the due process clause of the fifth amendment to the United States Constitution.

Statement of the Case

Appellant Sharron Frontiero joined the Air Force on October 1, 1968, for an obligated period of service of four years. On December 17, 1969, she married appellant Joseph Frontiero, who was and remains a full-time student at

Huntington College, Montgomery, Alabama. As stated in the agreed stipulation of fact on the basis of which this action was heard and determined, appellant Joseph Frontiero's total expenses are approximately $354.00 per month. With the exception of $205.00 per month which appellant Joseph Frontiero receives under the educational provisions of the G.I. Bill and $30.00 per month income from a part-time job, appellant Sharron Frontiero provides the sole support for both appellants.

The provisions of 37 U.S.C. Sections 401 and 403 grant a supplemental housing allowance to armed forces members living off-base (Basic Allowance for Quarters—BAQ), the allowance varying with the number of dependents claimed by the armed forces member. Male members are allowed to claim their spouses as dependents, and hence to gain extra benefits, regardless of the wives' actual financial dependency. The statute sets up a different definition of dependency for female armed forces members, allowing the females to claim their spouses as dependents, and hence gain supplemental benefits, only if the husband is in fact dependent upon the female service member for over one-half of his support.[1]

In the fall of 1970, after consulting with her commanding officer and a representative of the Base Legal Office, appellant Sharron Frontiero advised Col. George Jernigan, MAFB Hospital Commander, that she wanted to secure BAQ which would include the additional housing allowance that would have been granted automatically to males with spouses. Col. Jernigan informed her that the regulations

[1] Maxwell Air Force Base (MAFB) does not provide any base housing for the families of married female members of the Air Force. Complaint, para. III (2).

prohibited such allowances. In November, 1970, pursuant to the advice of a member of the Inspector General's staff, MAFB, appellant Sharron Frontiero submitted a formal complaint. Approximately one week thereafter, appellant Sharron Frontiero was informed that the complaint had been reviewed and that she was ineligible for any housing allowance.

Under 10 U.S.C. Sections 1072 and 1076, the wife and children of military personnel are entitled to comprehensive medical benefits, regardless of their potential or actual income. However, the husband of a female member of the armed forces is not entitled to any medical benefits unless he is "in fact dependent upon" the female member for more than one-half of his support (J.S. at 27a-29a). Appellant Sharron Frontiero seeks extension of these medical benefits to her spouse, appellant Joseph Frontiero.

On December 23, 1970, appellants filed a complaint in the United States District Court for the Middle District of Alabama, Northern Division, asserting that the distinctions drawn by these statutes and regulations, insofar as they required different treatment for female and male members of the uniformed services, arbitrarily and unreasonably discriminate against appellants and therefore violate the due process clause of the fifth amendment to the United States Constitution.

Over the dissent of Judge Johnson, the district court held that "the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and . . . are in all respects constitutional." 341 F. Supp. at 209 (J.S. at 15a-16a).

Summary of Argument

I.

37 U.S.C. Sections 401 and 403 and 10 U.S.C. Sections 1072 and 1076, providing that all wives of servicemen are eligible for housing allowances and medical benefits but only husbands of servicewomen who actually receive more than half their support from their wives are eligible for these allowances and benefits, denies appellants the equal protection of the law guaranteed by the due process clause of the fifth amendment.

Historically, women have been treated as subordinate and inferior to men. Although some progress toward erasing sex discrimination has been made, the distance to equal opportunity for women in the United States remains considerable. Like other groups that have been assisted toward full equality before the law via the "suspect classification" doctrine, women are sparsely represented in legislative and policy-making chambers and lack political power to remedy the discriminatory treatment they are accorded in the law and in society generally. Absent firm constitutional foundation for equal treatment of men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles.

II.

The distinctions between male and female members of the armed forces established by 37 U.S.C. Sections 401 and 403 and 10 U.S.C. Sections 1072 and 1076 create a "suspect classification" requiring close judicial scrutiny.

The challenged classification, based solely on sex, rests upon a foundation of myth and custom which assumes that the male is the dominant partner in marriage and which reinforces restrictive and outdated sex role stereotypes about married women and their participation in the work force. In recent years the national conscience has been awakened to the sometimes subtle injury inflicted on women by these stereotypes. Enlightened courts have begun to strike down discriminatory sex-based classifications as inconsistent with the equal protection guarantees of the Constitution. Nevertheless there is still substantial judicial confusion as to the standard of review appropriate to these challenges.

Recent changes in society's attitudes toward equal opportunity for men and women have made the underlying premise of the "suspect classification" clear: although the legislature may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference. The time is now ripe for this Court to repudiate the premise that, with minimal justification, the legislature may draw "a sharp line between the sexes," just as this Court has repudiated once settled law that differential treatment of the races is constitutionally permissible. *Amicus* is asking this Court to add legislative distinctions based on sex to the category of "suspect" classifications.

III.

The challenged classification is not justified by administrative convenience, the primary rationale relied on by the the court below. There is every indication, given the fact that almost 60% of married women work, that the increased cost of administration, if the test of actual dependency were applied to servicemen and their spouses, would be more than offset by the resultant reduction in benefits paid out. Apart from the question of whether the challenged classification actually results in financial savings, the administrative convenience rationale has been rejected by this Court, lower federal courts and, with regard to benefits payable to veterans and non-military federal employees, by the Congress, as a justification for discriminatory sex-based classifications. Finally, federal law prohibits private and state employers from engaging in practices like those challenged in the case at bar.

IV.

The discrimination against women mandated by the challenged classification is neither supported by a compelling state interest, necessary to the accomplishment of legitimate legislative objectives nor reasonably related to a permissible legislative objective. It is well established that convenience and simplicity, while admirable virtues in the administration of public affairs, do not constitute a compelling state interest. If the Court concludes that sex is not a suspect classification, or defers determination of this issue, *amicus* urges that it apply an intermediate test, developed in previous decisions of the Court: the challenged classification should be "closely scrutinized" to determine whether it is "necessary to the accomplishment of legitimate

legislative objectives." Even if the "rational relationship" test is applied, the challenged classifications do not pass constitutional muster: it is doubtful that the goal of administrative convenience is in fact served by the challenged classification; in any event, administrative convenience has been rejected by this Court under the rational relationship test as a justification for sex-based classifications.

V.

Upon finding that the challenged provisions violate the fifth amendment, the Court should remedy the defect by extending to female members of the armed forces the same benefits now available to male members. The dominant purpose of the statutes in which the challenged provisions appear, to attract and retain competent men and women in the armed forces, impels the remedy of extension. This remedy has been employed in numerous comparable cases by the Court. Recent action of the Congress to equalize fringe benefits available to male and female veterans and non-military federal employees by extending the benefits to the sex suffering discrimination, provides a clear indication of its remedial preference.

ARGUMENT

Introduction

Appellant, Lieutenant Sharron Frontiero, on the sole ground that she is a woman, has been denied medical benefits and a supplemental housing allowance for her civilian spouse, appellant Joseph Frontiero. 10 U.S.C. Sections 1072 and 1076, and 37 U.S.C. Sections 401 and 403 arbi-

trarily distinguish between male and female service members with respect to the benefits their spouses may receive. Under these statutes spouses of male members of the uniformed services are classified as "dependents" whether or not they are in fact; spouses of female members are classified as "dependents" only if the husband is in fact dependent on his wife for more than one-half of his support. Further, a regulation implementing 37 U.S.C. Sections 401 and 403, still in effect at the time the Jurisdictional Statement in this case was filed, disqualifies even wholly dependent spouses of female members unless they are mentally or physically incapable of self-support. Dep't of Defense, Military Pay and Allowance Entitlements Manual Section 30242 (J.S. at 30a). Underscoring the stark double standard embodied in this scheme, the regulation states explicitly that a servicewoman who assumes support of a husband attending college does not have a dependent spouse; a serviceman whose wife is capable of self-support but spends her days attending college continues automatically to receive full dependency allowances.[4]

The central question raised in this case is whether Congress, consistent with the equal protection principle inherent in the due process clause of the fifth amendment,[5] may legislate that married female members of the armed forces

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[4] A letter from the Deputy Comptroller General of the United States to the Secretary of Defense [B-161261], dated July 3, 1972, states that effective that date ". . . a female member of the uniformed services may be considered as having a dependent husband within the meaning of 37 U.S.C. 401 where there is sufficient evidence to establish his dependence on her for more than one-half of his support without regard to the husband's mental or physical capability to support himself."

[5] *See* pp. 20-21 *infra*.

must meet a "dependent spouse" requirement in order to receive fringe benefits granted automatically to similarly situated male members. The statutes at issue classify married male members of the armed forces as dominant partners in their marriage, but assign to married female members a subordinate status, absent proof that they supply more than half of their husbands' support. It is the position of *amicus* that this sex-based classification, established for a purpose unrelated to any biological difference between the sexes, cannot survive constitutional review.

I.

Historical Perspective

"'Man's world' and 'woman's place' have confronted each other since Scylla first faced Charybdis."[6] A person born female continues to be branded inferior for this congenital and unalterable condition of birth.[7] Her position in this country, at its inception, is reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in society's decision-making councils:

> Were out state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men. Quoted in M. Gruberg, Women in American Politics 4 (1968).

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[6] E. Janeway, Man's World Woman's Place: A Study in Social Mythology 7 (1971).

[7] *See* C. Bird, Born Female: The High Cost of Keeping Women Down (1968).

Alexis de Tocqueville, some years later, included this observation among his commentaries on life in the young United States:

> In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes, and to make them keep pace one with the other, but in two pathways which are always different. American women never manage the outward concerns of the family, or conduct a business, or take a part in political life .... Democracy in America, pt. 2 (Reeves tr. 1840), in World's Classics Series, Galaxy ed., p. 400 (1947).[8]

During the long debate over women's suffrage the prevailing view of the partition thought ordained by the Creator was rehearsed frequently in the press and in legislative chambers. For example, an editorial in the New York Herald in 1852 asked:

> How did women first become subject to man as she now is all over the world? By her nature, her sex, just as the negro, is and always will be, to the end of time, inferior to the white race, and therefore, doomed to subjection; but happier than she would be in any other condition, just because it is the law of her nature. The women themselves would not have this law reversed .... Quoted in A. Kraditor, Up From the Pedestal:

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[8] *Cf.* Ibsen's observation on the society of his day:

> A woman cannot be herself in a modern society. It is an exclusively male society with laws made by men, and with prosecutors and judges who assess female conduct from a male standpoint. Quoted in Meyer, Introduction to H. Ibsen, A Doll's House at 9 (M. Meyer transl. 1965).

Selected Writings in the History of American Feminism 190 (1968).

And a legislator commented during an 1866 debate in Congress:

> It seems to me as if the God of our race has stamped upon [the women of America] a milder, gentler nature, which not only makes them shrink from, but disqualifies them for the turmoil and battle of public life. They have a higher and holier mission. It is in retiracy [sic] to make the character of coming men. Their mission is at home, by their blandishments and their love to assuage the passions of men as they come in from the battle of life, and not themselves by joining in the contest to add fuel to the very flames . . . . It will be a sorry day for this country when those vestal fires of love and piety are put out. Quoted in E. Flexner, Century of Struggle 148-49 (1970 ed.), from Cong. Globe, 39 Cong., 2d Sess., Part I, p. 66.

The common law heritage, a source of pride for men, marked the wife as her husband's chattel, "something better than his dog, a little dearer than his horse."* Blackstone explained:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert* . . . under the protection and influence

* Alfred Lord Tennyson, Locksley Hall (1842).

> of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. 1 Blackstone's Commentaries on the Law of England 442 (3d ed. 1768).[10]

Prior to the Civil War, the legal status of women in the United States was comparable to that of blacks under the slave codes, although the white woman ranked as "chief slave of the harem."[11] Neither slaves nor married women had the legal capacity to hold property or to serve as guardians of their own children. Neither blacks nor women could hold office, serve on juries, or bring suit in their own names. Men controlled the behavior of both their slaves and their wives and had legally enforceable rights to their services without compensation. *See* L. Kanowitz, Women and the Law: The Unfinished Revolution 5-6 (1969). As Gunnar Myrdal remarked, the parallel was not accidental, for the legal status of women and children served as the model for the legal status assigned to black slaves:

> In the earlier common law, women and children were placed under the jurisdiction of the paternal power.

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[10] An earlier formulation of the same thesis was set out in The Lawes Resolutions of Womens Rights (London, 1632):

> Man and wife are one person, but understand in what manner. When a small brooke or little river incorporateth with Rhodanus, Humber or the Thames, the poor rivulet looseth its name, it is carried and recarried with the new associate, it beareth no sway, it possesseth nothing during coverture. A woman as soon as she is married, is called *covert*, in Latin, *nupta*, that is, *veiled*, as it were, clouded and overshadowed, she hath lost her streame. . . . To a married woman, her new self is her superior, her companion, her master. Quoted in E. Flexner, Century of Struggle 7-8 (1970 ed.).

[11] Comment attributed to Dolly Madison, in H. Martineau, Society in America, Vol. 2, 81 (1842, 1st ed. 1837).

When a legal status had to be found for the imported Negro servants in the seventeenth century, the nearest and most natural analogy was the status of women and children. The ninth commandment—linking together women, servants, mules and other property—could be invoked, as well as a great number of other passages of Holy Scripture. An American Dilemma 1073 (2d ed. 1962).

In answer to feminist protests, the legal disabilities imposed on women were rationalized at the turn of the century much as they were at an earlier age. Blackstone set the pattern:

> [E]ven the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England. 1 Blackstone's Commentaries on the Laws of England 445 (3d ed. 1768).

Grover Cleveland echoed this rationale, arguing that, although women were denied the vote, the statute books were full of proof of the chivalrous concern of male legislators for the rights of women. Would Women Suffrage Be Unwise?, 22 Ladies Home Journal 7-8 (Oct. 1905), quoted in A. Kraditor, Up From the Pedestal: Selected Writings in the History of American Feminism 199-203 (1968).

American women assessed their situation from a different perspective. At the Women's Rights Convention in Seneca Falls, New York, in 1848, a declaration of women's rights was drafted which included the following sentiments:

> The history of mankind is a history of repeated injuries and usurpations on the part of man toward

> woman, having in direct object the establishment of an absolute tyranny over her . . . .
>
> He has compelled her to submit to laws, in the formation of which she had no voice.
>
> • • • • •
>
> He has taken from her all right in property, even to the wages she earns.
>
> • • • • •
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> . . . . In the covenant of marriage, . . . the law gives him power to deprive her of her liberty, and to administer chastisement.
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> • • • • •
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> . . . . He closes against her all the avenues to wealth and distinction which he considers most honorable to himself. . . .
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> • • • • •
>
> He has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.
>
> History of Woman Suffrage, Vol. I, at 70-75 (E.C. Stanton, S.B. Anthony & N.J. Gage eds. 1881).

Men viewing their world without rose-colored glasses would have noticed in the last century, as those who look will observe today, that no pedestal marks the place occupied by most women. At a women's rights convention in Akron, Ohio, in 1851, Sojourner Truth, an abolitionist and former slave, responded poignantly to the taunts of clergy-

men who maintained that women held a favored position and were too weak to vote:

> The man over there says women need to be helped into carriages and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages or over puddles, or gives me the best place —and ain't I a woman?
>
> Look at my arm! I have ploughed and planted and gathered into barns, and no man could head me—and ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman? I have born thirteen children, and seen most of 'em sold into slavery, and when I cried out with my mother's grief, none but Jesus heard me—and ain't I a woman?

E. Flexner, Century of Struggle 90-91 (1970 ed.).

Of course, the legal status of women has improved since the Nineteenth Century. The Married Women's Property Acts, passed in the middle of the Nineteenth Century, opened the door to a measure of economic independence for married women. *See* L. Kanowitz, Women and the Law: The Unfinished Revolution 40-41 (1969). The nineteenth amendment gave women the vote in 1920, after almost three-quarters of a century of struggle.[12] But, even in the 1970's, woman's place as subordinate to men is still reflected in many statutes regulating diverse aspects of

[12] *See* E. Flexner, Century of Struggle (1970 ed.); W. O'Neill, Everyone Was Brave: The Rise and Fall of Feminism in America (1969).

life.[13] A small sample of those statutes is contained in the Appendix to Brief for Appellant at 69-88, *Reed* v. *Reed*, 404 U.S. 71 (1971).

In very recent years, a new appreciation of woman's place has been generated in the United States.[14] Activated by feminists of both sexes, legislatures and courts have begun to recognize and respond to the subordinate position of women in our society and the second-class status our institutions historically have imposed upon them. The awakening national consciousness that equal opportunity for men and women is a matter of simple justice has led to significant reform, most notably on the federal level: Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, the Equal Pay Act of 1963, 29 U.S.C. Section 206(d), and executive orders designed to eliminate discrimination against women in federal employment and in employment under federal contract.[15]

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[13] For example, apart from the discrimination in fringe benefits once women enter the military, they are subjected in the first instance to a statutory quota drastically limiting their opportunity for entry. *See* 10 U.S.C. Section 8215 (women enlistees and officers may not constitute more than 2% of the Regular Air Force). For other qualifications applied to women but not to men, *see* Air Force Manual 36-5, sections 2-2(n), 2-13(d)(2), 3-1(a)(19) (Sept. 30, 1970).

[14] *See, e.g.*, American Women, Report of the President's Commission on the Status of Women, and seven accompanying committee reports (1963); American Women 1963-1968, Report of the Interdepartmental Committee on the Status of Women, and four accompanying Task Force reports of the Citizens' Advisory Council (1968); L. Kanowitz, Women and the Law: The Unfinished Revolution (1969); A Matter of Simple Justice, Report of the President's Task Force on Women's Rights and Responsibilities (1970); Murray, The Rights of Women, in The Rights of Americans: What They Are—What They Should Be 521 (N. Dorsen ed. 1971).

[15] *See generally*, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971); Murphy, Female Wage Discrimination: A Study

The overwhelming approval of the Equal Rights Amendment to the United States Constitution confirms the dominant intent of Congress to terminate sex-based discrimination by law. In the course of the debate on the Amendment, however, Congress made plain its view that appropriate construction and application of the fifth and fourteenth amendments would amply secure equality of rights and responsibilities between the sexes.[16] Nonetheless, Congress wishes to provide further assurances so there would not be the slightest doubt that the right of men and women to equal treatment under the law would be recognized as a fundamental constitutional principle.[17]

In 1963, the President's Commission on the Status of Women concluded that "equality of rights under the law

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of the Equal Pay Act 1963-70, 39 U. Cin. L. Rev. 615 (1970). In 1972, Congress extended the range of Title VII via the Equal Employment Opportunity Act of that year. *See* Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824 (1972). The protection of the Equal Pay Act was also extended in 1972. *See* Section 906(b)(1) of the Education Amendments of 1972, P.L. 92-318, 86 Stat. 375 (executive, administrative, professional, and outside sales employees covered).

[16] *See* 116 Cong. Rec. 28005 (1970) (Statement of Representative Martha Griffiths) ("There never was a time when decisions of the Supreme Court [under the fifth and fourteenth amendments] could not have done everything we ask today."); 118 Cong. Rec. S4564 (daily ed., Mar. 22, 1972) (Statement of Senator Tunney) ("... if the courts were to move forward with regard to interpreting the 14th amendment to afford true equal protection for women, the new amendment could be redundant. Even so, the enactment ... will symbolize and emphasize this country's dedication to providing true equality for all.").

[17] *Cf.* 2 J. Story, Commentaries on the Constitution Section 1939 (5th ed. 1891):

> [T]he repetition of securities [for individual rights] may well be excused so long as the slightest doubt of their having been already sufficiently declared shall anywhere be found to exist.

for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land."[18] The Commission believed that this principle was embodied in the fifth and fourteenth amendments, and looked to this Court for "imperative" clarification to eliminate "remaining ambiguities with respect to the constitutional protection of women's rights." The case at bar presents an opportunity for definitive pronouncement providing this overdue clarification.

II.

The statutes at issue discriminate against female members of the uniformed services and constitute a denial of equal protection of the laws, guaranteed by the due process clause of the fifth amendment.

A. *The fifth amendment due process clause encompasses guarantees of security from arbitrary treatment and of equal protection of the laws; appellants' case rests upon these fundamental guarantees.*

The due process clause of the fifth amendment to the Constitution, commanding and regulating federal action and legislation, guarantees to every person security from arbitrary treatment and the equal protection of the laws. In this regard, the fifth amendment imposes the same obligation upon the federal government as the fourteenth amendment does upon the states. *See Shapiro* v. *Thompson*, 394 U.S. 618, 641-42 (1969); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d

[18] President's Commission on the Status of Women, American Women 44-45 (1963).

959, 969-70 (4th Cir. 1963) (en banc), *cert. denied*, 376 U.S. 938 (1964); *Davis* v. *Richardson*, 342 F. Supp. 588, 591 (D. Conn. 1972) (three-judge court); *Morris* v. *Richardson*, 346 F. Supp. 494, 499 (N.D. Ga. 1972) (three-judge court); *Miller* v. *Laird*, Civil No. 752-71 (D.D.C. Aug. 31, 1972) (three-judge court); *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969). *See also* Brief for Appellee at 28, *Welsh* v. *United States*, 398 U.S. 333 (1970) (federal government's affirmation that "equal protection" notion implicit in the fifth amendment precludes federal authorities from acting arbitrarily or capriciously and from engaging in invidious discrimination). Moreover, it is plain that "where treatment accorded is based on sex the classification is subject to scrutiny under equal protection principles. . . . [A]nd those principles of equal protection . . . apply . . . as part of due process under the Fifth Amendment." *Moritz* v. *Commissioner of Internal Revenue*, No. 71-1127, — F.2d — (10th Cir. Nov. 22, 1972).

B. The classification at issue in this case is based solely on sex.

10 U.S.C. Sections 1072 and 1076, and 37 U.S.C. Sections 401 and 403, require male as well as female members of the armed forces to prove the dependency in fact of certain relatives (*e.g.*, parents) as a condition of the grant of benefits. The majority below, pointing to such provisions, stated that "the statutory scheme as a whole does not differentiate invidiously on the basis of sex," and concluded, "perforce, then, there is no abridgment of the Constitution." 341 F. Supp. at 206 (J.S. at 8a).

In this the majority below was in error. While it is often appropriate to look to the statutory scheme as a whole to resolve uncertainties about the meaning of a section of a

statute, a provision of a statute challenged as unconstitutional cannot be saved by the constitutionality of the remaining sections. The statutory provisions at issue in this case are not those that treat male and female members of the armed forces equally, but precisely those that treat them differently. They require a female member to prove the dependency of her spouse before receiving benefits for him while granting fringe benefits to a male member for his spouse without regard to her dependency upon him. As Judge Johnson stated in his dissenting opinion, "the majority's excursion into other aspects of these statutes is irrelevant to the issue in this case." 341 F. Supp. at 210 (J.S. at 17a).

C. *Equal protection standards of review.*

In determining whether legislation violates the concept of equal protection, the courts have applied standards of review ranging from lenient to stringent. *See* Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). Two standards are generally contrasted: (1) the lenient or "rational relationship" test applicable in the generality of cases; (2) the "rigid scrutiny" test met only by demonstration of a "compelling state interest," applicable when the legislation relates to a "fundamental right or interest" or invokes a "suspect" criterion.

To survive the "rational relationship" test, a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920), cited with approval in *Reed* v. *Reed*, 404 U.S. at 76. The more stringent test is exemplified in cases dealing with the right

to vote, and the right to travel, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 667, 670 (1966) (poll tax in state elections); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) (durational residence requirements for voting), and in cases involving classification based on race, ancestry or national origin, *e.g.*, *Graham* v. *Richardson*, 403 U.S. 365 (1971); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Takahashi* v. *Fish and Game Comm'n*, 334 U.S. 410 (1948).

In addition to the two commonly articulated review standards, some of the decisions of this Court suggest an intermediate standard: the legislation is "closely scrutinized," and the proponent of the challenged classification is required to show that it is "necessary to the accomplishment of legitimate [legislative] objectives." *Bullock* v. *Carter*, 405 U.S. 134, 144 (1972); *cf. Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

With respect to the standard of review in this case, our position is three-fold: (1) 37 U.S.C. Sections 401 and 403 and 10 U.S.C. Sections 1072 and 1076 establish a suspect classification for which no compelling justification can be shown; alternatively, (2) the classification at issue, closely scrutinized, is not reasonably necessary to the accomplishment of any legitimate legislative objective; and, finally, (3) without regard to the suspect or invidious nature of the classification, the line drawn by Congress, distinguishing between married servicemen and married servicewomen for purposes of fringe benefits, lacks the constitutionally required fair and reasonable relation to a permissible legislative objective.

D. Rather than assigning a "heavy burden" to appellants and applying a "lenient" standard of review, the court below should have subjected 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 to close scrutiny, identifying sex as a "suspect" criterion for legislative distinctions.

1. The challenged classification rests upon a view of the married woman which does not accord with present day reality.

The challenged classification, which assumes that the man is the dominant partner in a marriage and that the woman occupies a subordinate position, rests upon a foundation of myth and custom still reflected in myriad laws,[19] but out of tune with conditions of life in this second half of the Twentieth Century. Such classifications once appeared to jurists as "benign," benefiting women who occupied the traditional role of mother and homemaker,[20] or "neutral," accurately describing social reality. Examined from a contemporary perspective, however, these classifications reinforce restrictive and outdated sex-role stereotypes and penalize married women who do not conform to the assumed general pattern.

National statistics relegate to myth the notions that relatively few married women work, and that when they do,

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[19] For a catalogue, *see* Kay, Book Review [Marriage Stability, Divorce, and the Law], 60 Calif. L. Rev. 1683 (Nov. 1972). *See also* L. Kanowitz, *supra*, at 35-99; Citizens' Advisory Council on the Status of Women, Report of the Task Force on Family Law and Policy (1968); President's Commission on the Status of Women, Report of the Committee on Civil and Political Rights (1963).

[20] *But cf. Ruggiero* v. *Manchin*, 456 F.2d 1282 (4th Cir. 1972) (although husband was the dominant breadwinner in the family, he was "dependent" upon his wife for services that have a pecuniary value).

their earnings are "pin money" rather than an essential part of the family's finances. In April, 1971, 42.7% of all women 16 years of age or older were in the labor force, compared with 28.9% in March, 1940.[21] Of these women, 18.5 million, or 58.5% of working women, were married and living with their husbands.[22] This is almost twice the rate of 1940.[23] From 1960 to 1970, nearly half of the increase in the labor force was accounted for by married women.[24] And for the last four years, married women have made up the largest portion of the annual increase in the civilian labor force.[25] Married women of all ages are increasing their rate of labor force participation while other groups are not.[26]

Nor are these largely families where the husband is unemployed.[27] In 42% of families where both spouses were present, both were employed.[28] Of women who work, the number of wives in the labor force with working husbands has been increasing at a faster rate than the number of working wives with husbands who are not employed.[29]

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[21] U.S. Bureau of Labor Statistics, Dept. of Labor, Employment and Earnings 34-35 (May 1971).

[22] U.S. Women's Bureau, Dept. of Labor, Why Women Work 1 (rev. ed. July 1972) [hereinafter cited as Why Women Work].

[23] U.S. Women's Bureau, Dept. of Labor, Bull. No. 294, 1969 Handbook on Women Workers 39 (1969).

[24] Waldman, Changes in the Labor Force Activity of Women, 93 Monthly Labor Rev., June 1970, 10, 11.

[25] Waldman & Young, Marital and Family Characteristics of Workers, March 1970, March 1971, 94 Monthly Labor Rev. 46.

[26] A. Ferriss, Indicators of Trends in the Status of American Women 103 (1971) [hereinafter cited as Ferriss].

[27] 7.6 million husbands were not in the labor force or were unemployed in March, 1971. Why Women Work at 2.

[28] Ferriss at 95.

[29] *Id.*

Thus, at present, the husband's unemployment is not a prime indicator of the wife's labor force status.[20]

Neither the dramatic increase in women's labor market participation, nor statutory remedies against sex discrimination in employment, however, has halted discrimination against working women. The median annual income in 1970 for full-time work was $8,966 for men and $5,323 for women; *i.e.*, women earned 59.4% of the male median income.[21] This differential is in large part the product of multiple discrimination: in base pay; in fringe benefits; and in tracking women into lower paying and less responsible jobs and keeping them there. The most frequently offered justification for these practices is that women are merely secondary earners; as "pin money" workers, they want less responsibility and thus deserve lower pay even for the same job. But in fact, the financial contribution of the "assistant breadwinner" frequently means the difference between poverty and a decent standard of living for her family.[22] In 23.4% (or 7.4 million) of families with both spouses working, the husbands earned less than $7,000 ($6,960 is estimated by the Bureau of Labor Statistics as sufficient to provide only a low standard of living for an urban family of four).[23]

Sharron and Joseph Frontiero fall into this last mentioned income category. Both are financial contributors; Joseph Frontiero's G.I. bill stipend amounts to $205 per

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[20] *Id.*

[21] U.S. Women's Bureau, Dept. of Labor, Fact Sheet on the Earnings Gap 1 (rev. ed. Dec. 1971).

[22] U.S. Women's Bureau, Dept. of Labor, Twenty Facts on Women Workers 2 (1972).

[23] Why Women Work at 1.

month. His income totals approximately $2,820 per year, hardly enough by any realistic standard to warrant the conclusion that he is financially independent of his wife. In this marriage, the wife is presently the primary wage-earner; the husband, the "assistant breadwinner." The benefits appellants have been denied would significantly supplement a very moderate family income. These benefits are an integral part of the compensation men in Lt. Frontiero's situation receive automatically. Appellants Sharron and Joseph Frontiero do not receive them, because her labor, by congressional mandate, is worth less than the labor of a similarly situated man in terms of the benefits it brings to the family unit.

2. Enlightened courts have begun to strike down discriminatory sex-based classifications as inconsistent with the equal protection guarantees of the United States Constitution; but there is substantial confusion as to the standard of review appropriate to these challenges.

The significant changes that have occurred in society's attitudes toward equal opportunity for men and women[14] should yield a deeper appreciation of the premise underlying the "suspect classification" doctrine: although the legislature may distinguish between individuals on the basis of their ability or need, it is presumptively impermissible to distinguish on the basis of congenital and unalterable traits of birth over which the individual has no control and for which he or she should not be penalized.

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[14] *See, e.g.*, The Changing Roles of Men and Women (E. Dahlstrom ed. 1967); E. Janeway, Man's World, Woman's Place: A Study in Social Mythology (1971); A. Montagu, Man's Most Dangerous Myth 181-84 (4th ed. 1964); G. Myrdal, An American Dilemma 1073-78 (2d ed. 1962); Watson, Social Psychology: Issues and Insights 435-56 (1966).

Such conditions include not only race, lineage and alienage, criteria already declared "suspect" by this Court,[35] but include as well the sex of the individual.[36]

No longer shackled by decisions reflecting social and economic conditions of an earlier era,[37] enlightened judges in both federal and state courts are becoming increasingly skeptical of lines drawn or sanctioned by governmental authority on the basis of sex. A recent decision of the California Supreme Court, *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971), exemplifies the new understanding and explicitly denominates sex a suspect classification:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the

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[35] Although the paradigm suspect classification is, of course, one based on race, this Court has made it plain that the doctrine is not confined to a "two-class theory." *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954); *see Graham* v. *Richardson*, 403 U.S. 365 (1971).

[36] *See* Crozier, Constitutionality of Discrimination Based on Sex, 15 B.U.L. Rev. 723, 727-28 (1935); Eastwood, The Double Standard of Justice: Women's Rights Under the Constitution, 5 Val. L. Rev. 281, 296-97 (1971); Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675, 738-41 (1971); Note, Are Sex-Based Classifications Constitutionally Suspect?, 66 Nw. U.L. Rev. 481 (1971); Note, 84 Harv. L. Rev. 1499 (1971).

[37] *See Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 669-70 (1966): "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." (Emphasis in original); *White* v. *Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1966) (three-judge court): "The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. It is therefore this Court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society." *See also* L. Hand, The Spirit of Liberty 160 (Dillard ed. 1952).

accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. . . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. . . .

Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental

interest such as employment. 5 Cal. 3d at 18-20, 485 P.2d at 540-41.

In numerous other cases, sex lines unsupported by strong affirmative justification have failed to survive constitutional review. *See, e.g., Mengelkoch* v. *Industrial Welfare Commission,* 442 F.2d 1119 (9th Cir. 1971) (maximum hours laws applicable to women only presents substantial federal constitutional question); *Kirstein* v. *Rector and Visitors of the University of Virginia,* 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court) (women entitled to equal access with men to state university's "prestige" college)[11]; *White* v. *Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court) (Alabama's exclusion of women from jury service held unconstitutional); *Bennett* v. *Dyer's Chop House,* —— F. Supp. ——, 41 U.S.L.W. 2243 (N.D. Ohio Oct. 26, 1972) and *Seidenberg* v. *McSorleys' Old Ale House,* 317 F. Supp. 593 (S.D.N.Y. 1970), 308 F. Supp. 1253 (S.D.N.Y. 1969) (exclusion of women patrons from liquor licensed place of public accommodation held unconstitutional); *Mollere* v.

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[11] *Cf. Williams* v. *McNair,* 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.,* 401 U.S. 951 (1971) (females-only admission policy of state supported college does not violate male students' right to equal protection where no showing was made of any feature rendering all-female facility more advantageous educationally than state supported institutions to which males are admitted). *Kirstein* and *Williams* are not in conflict. Pairing the two, they reflect the opinion of distinguished academicians:

> . . . we do not find the argument against women's colleges as persuasive as the argument against men's colleges. This is a wholly contextual judgment. If America were now a matriarchy (as some paranoid men seem to fear it is becoming) we would regard women's colleges as a menace and men's colleges as a possibly justified defense. C. Jencks & D. Reisman, The Academic Revolution 298 (1968).

See also Note, The Constitutionality of Sex Separation in School Desegregation Plans, 37 U. Chi. L. Rev. 296 (1971).

Southeastern Louisiana College, 304 F. Supp. 826 (E.D. La. 1969) (declaring unconstitutional requirement that unmarried women under 21 live in state college dormitory when no such requirement was imposed on men); *United States ex rel. Robinson* v. *York*, 281 F. Supp. 8 (D. Conn. 1968) (differential sentencing laws for men and women held a violation of equal protection); *Gates* v. *Foley*, 247 So. 2d 40 (Fla. 1971) (wife constitutionally entitled to same right as husband to recover for loss of consortium); *Paterson Tavern & Grill Owners Association* v. *Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970) (police power does not justify exclusion of women from bartender occupation); *Commonwealth* v. *Daniel*, 430 Pa. 642, 243 A.2d 400 (1968) (differential sentencing laws for men and women held unconstitutional); *In re Estate of Legatos*, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (inheritance tax on certain property when devised by husband to wife, but not when devised by wife to husband violates equal protection); *Matter of Shpritzer* v. *Lang*, 17 A.D.2d 285, 289, 234 N.Y.S.2d 285, 289 (1st Dept. 1962), *aff'd*, 13 N.Y.2d 744, 241 N.Y.S. 2d 869 (1963) (exclusion of policewomen from promotional examination for sergeant would impermissibly deny constitutional rights solely because of sex); *Wilson* v. *Hacker*, 101 N.Y.S.2d 461 (Sup. Ct. 1950) (union's discrimination against female bartenders "must be condemned as a violation of the fundamental principles of American democracy").

This Court's decision in *Reed* v. *Reed*, *supra*, has heightened the debate concerning the degree of scrutiny appropriately accorded sex-based classifications. In *Reed*, the question of the stringency of review was left open because the Idaho statute there at issue "failed to satisfy even the

more lenient equal protection standard." *Eisenstadt* v. *Baird*, 405 U.S. 438, 447 n.7 (1972). Significantly, the majority below overlooked the explanation in *Eisenstadt* v. *Baird* of the approach taken in *Reed*, and instead understood *Reed* as requiring application of a "lenient" review standard in sex discrimination cases.

Some courts regard *Reed* as a major precedent marking a new direction in judicial review of sex-based classifications. *See, e.g., Moritz* v. *Commissioner of Internal Revenue, supra* (when placed under the scrutiny required by *Reed*, income tax deduction classification premised primarily on sex lacks justification); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972) (16 (boys)/18 (girls) sex-age differential for juvenile offender treatment held unconstitutional); *Cohen* v. *Chesterfield County School Board*, —— F.2d ——, 41 U.S.L.W. 2167 (4th Cir. Sept. 14, 1972); *La Fleur* v. *Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972); *Williams* v. *San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972); *Heath* v. *Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972) (all relying on *Reed* to invalidate regulations requiring termination of employment at a fixed stage of pregnancy); *Paxman* v. *Wilkerson*, Civil No. 638-71-R (E.D. Va. Nov. 15, 1972) (all school districts in Virginia must treat pregnancy the same as any other temporary disability); *Robinson* v. *Rand*, 340 F. Supp. 37 (D. Colo. 1972) (involuntary discharge from the Air Force grounded solely on servicewoman's pregnancy declared unconstitutional); *Bravo* v. *Board of Education*, 345 F. Supp. 155 (N.D. Ill. 1972) (forced leave at fixed stage of pregnancy declared unconstitutional); *Bray* v. *Lee*, 337 F. Supp. 934 (D. Mass. 1972)

(higher admission standard for females in Boston Latin Schools violates equal protection); *Shull* v. *Columbus Municipal Separate School District*, 338 F. Supp. 1376 (N.D. Miss. 1972) (unwed mothers may not be barred from high school); *Brenden* v. *Independent School District*, 342 F. Supp. 1224 (D. Minn. 1972); *Reed* v. *Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972) (girls may not be excluded from participation in interscholastic competition on varsity teams); *Matter of Patricia A.*, 31 N.Y. 2d 83, 335 N.Y.S.2d 33 (1972) (16 (boys)/18 (girls) sex-age differential for classification of "persons in need of supervision" declared unconstitutional).

On the other hand, "lenient" review of sex-based discrimination is evident in *Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3261 (U.S. Sept. 21, 1972) (No. 474); *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted*, 41 U.S.L.W. 3220 (U.S. Oct. 24, 1972) (No. 178); *Gutierrez* v. *Laird*, 346 F. Supp. 289 (D.D.C. 1972), *appeal pending*, No. 72-1829, D.C. Cir. (all three upholding automatic termination of employment of pregnant women); *Eslinger* v. *Thomas*, 324 F. Supp. 1329 (D.S.C. 1971) (denying preliminary injunctive relief against refusal of state senate to hire female page), 340 F. Supp. 886 (D.S.C. 1972) (denying permanent injunction). Significantly, in the cases appraising *Reed* as a decision marking a new direction, the challenged classifications succumbed to judicial review; in those assigning minimal precedential value to *Reed*, including the case at bar, the classifications survived.

Some courts have even seen in *Reed* implicit rejection of a strict standard of review in cases challenging sex-based

classifications."[39] *See, e.g., Buchas* v. *Illinois High School Ass'n*, 41 U.S.L.W. 2277 (N.D. Ill. Nov. 15, 1972) ("implicit in [the *Reed*] holding is the proposition that sex is not an inherently suspect classification"). And the majority below concluded, on the basis of *Reed*, "in this case we would be remiss in applying the compelling interest test." 341 F. Supp. at 206 n.2 (J.S. at 9a). Then, in making the judgment "whether the classification established in the legislation is reasonable and not arbitrary and whether there is a rational connection between the classification and a legitimate governmental end," the court concluded that "the statute must be upheld 'if any state of facts rationally justifying it is demonstrated to *or perceived by* the courts.' *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970)" (emphasis supplied by court below). 341 F. Supp. at 206 (J.S. at 9a).

3. Precedent in need of revaluation: "benign" classifications that provide a "place" for woman in man's world.[40]

Decisions of this Court that span a century, none of them revaluated in *Reed*, have contributed to this anomaly: pre-

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[39] This interpretation of *Reed* is urged in a petition for certiorari now before the Court:

> . . . The decision below is in conflict with the decision of this Court in *Reed* v. *Reed*. . . .
>
> This Court [in *Reed*] did not adopt nor comment upon, although urged to do so by 'Women's Liberation' groups, the standards by which discriminations based on race are judged for Fourteenth Amendment purposes, *i.e.*, the 'strict scrutiny' test.

Petition for certiorari at 4-5, *La Fleur* v. *Cleveland Bd. of Educ.*, *supra*, petition filed Nov. 27, 1972.

[40] "For if women have only a place, clearly the rest of the world must belong to someone else and, therefore, in default of God, to men." E. Janeway, Man's World, Woman's Place: A Study in Social Mythology 7 (1971).

ostensibly well-meaning exaltation of woman's unique role as wife and mother has, in effect, denied women equal opportunity to develop their individual talents and capacities and has impelled them to accept a dependent, subordinate status in society.

This Court's assessment of women's claims to full participation in society outside the home began with *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), in which the majority, in a brief, dispassionate opinion explained that neither the privileges and immunities clause of article IV, section 2 of the Constitution, nor the privileges and immunities clause of the fourteenth amendment, secured to Myra Bradwell the right to practice law.[41] In a concurring opinion Justice Bradley looked beyond the Constitution to "the law of the Creator":

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood. . . .

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[41] *Bradwell* was followed in *In re Lockwood*, 154 U.S. 116 (1894). It is now established that arbitrary denial of admission to the bar of a state violates the due process and equal protection guarantees of the fourteenth amendment. *See Konigsberg* v. *State Bar*, 353 U.S. 252, 262 (1957); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957). The *Bradwell* and *Lockwood* decisions are legal deadwood and should be museum pieces. But a century after the *Bradwell* decision, equal opportunity for women in the legal profession remains unfinished business. *See* Read & Petersen, Sex Discrimination in Law School Placement, 18 Wayne L. Rev. 639 (1972).

> It is true that many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. 83 U.S. (16 Wall.) at 141.[42]

Although the method of communication between the Creator and the jurist is never disclosed, "divine ordinance" has been a dominant theme in decisions justifying laws establishing sex-based classifications. *E.g., State* v. *Heilman*, 105 Kan. 139, 146-47, 181 P. 630, 633-34 (1919); *State* v. *Bearcub*, 465 P.2d 252, 253 (Ore. Ct. App. 1970). Well past the middle of the Twentieth Century, laws delineating "a sharp line between the sexes," [43] were sanctioned on the basis of assumptions unnecessary to prove, and impossible to disprove, for their lofty inspiration was an article of faith.

In *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1874), the Court ruled that the right to vote was not among the "privileges and immunities of United States citizenship," hence states were not inhibited by the Constitution from committing "that important trust to men alone." But the Court emphasized that, beyond doubt, women are "persons" and may be "citizens" within the meaning of the fourteenth amendment. The significance of this clear statement has been discounted by some commentators,[44] perhaps be-

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[42] For a recent descendant of Justice Bradley's opinion in *Bradwell* v. *Illinois*, *see State* v. *Hunter*, 208 Ore. 282, 287-88, 300 P.2d 455, 457-58 (1956), discussed in Johnston & Knapp, *supra* at 692.

[43] *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948).

[44] *See* Hodes, Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment, 25 Rutgers L. Rev. 26 (1970).

cause the Court also pointed out that children qualify under both headings.

A landmark decision of the Court, responding to turn of the century conditions when women labored long into the night in sweatshop operations,[44] *Muller* v. *Oregon*, 208 U.S. 412 (1908), is described by some commentators today as a "roadblock to the full equality of women."[45] The issue in *Muller* was the constitutionality of an Oregon statute prohibiting the employment of women "in any mechanical establishment, or factory, or laundry" for more than ten hours per day. Muller, a laundry owner, was convicted of a violation of this statute. Three years earlier, in *Lochner* v. *New York*, 198 U.S. 45 (1905), the Court had declared unconstitutional a New York statute setting maximum hours of work at ten per day and sixty per week for all bakery employees, men as well as women. Not yet prepared to overrule *Lochner*, the Court distinguished it in an opinion reflecting the differences in the station occupied by men and women in the society of that day.

Interwoven in the *Muller* opinion are two themes: (1) recognition of the intolerable exploitation of women workers; (2) concern for the health of the sex believed to be weaker in physical structure but assigned the role of bearing the future generation ("[T]he physical well-being of

[44] For historical perspective, *see* E. Baker, Protective Labor Legislation 101, 149-277, 444-56 (1925); E. Flexner, Century of Struggle: The Women's Rights Movement in the United States 213-15 (1970 ed.).

[45] Murray, The Rights of Women, in The Rights of Americans: What They Are—What They Should Be 521, 525 (N. Dorsen ed. 1971). For criticism when the decision was generally regarded in a favorable light, *see* Crozier, Regulation of Conditions of Employment of Women: A Critique of *Muller* v. *Oregon*, 13 B.U.L. Rev. 398 (1933).

woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." 208 U.S. at 421.) Accepting as historic fact man's domination of woman, the Court stressed that women must "rest upon and look to [man] for protection" and, somewhat inconsistently, that she requires the aid of the law "to protect her from the greed as well as the passion of man." 208 U.S. at 422.[47]

Uncritical reliance upon *Muller* for the broad proposition that sex is a valid basis for legislative classification has been persistent and still occurs,[48] although the issue in *Muller*—whether half a loaf would be allowed to state legislatures after the full loaf was denied in *Lochner*—long ago lost all vitality. *See Bunting* v. *Oregon*, 243 U.S. 426 (1917) (state may prescribe maximum hours of labor by *all* employees); *United States* v. *Darby*, 312 U.S. 100 (1941) (upholding the federal Fair Labor Standards Act and, in the process, thoroughly repudiating the reasoning responsible for the *Lochner* decision); *Mengelkoch* v. *Industrial Welfare Commission, supra.* Moreover, indicative of the changes in economic and social life in the decades since *Muller*, women workers—principally blue collar workers—have successfully challenged under Title VII laws restricting the hours women may work. As the work day shortened from twelve hours to eight, and the work week from six

[47] *Muller* was followed in several cases presented in much the same societal climate and legal setting: *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937); *Radice* v. *New York*, 264 U.S. 292 (1924); *Bosley* v. *McLaughlin*, 236 U.S. 385 (1915); *Miller* v. *Wilson*, 236 U.S. 373 (1915); *Hawley* v. *Walker*, 232 U.S. 718 (1914); *Riley* v. *Massachusetts*, 232 U.S. 671 (1914).

[48] *See* most recently *Rinehart* v. *Westinghouse Elec. Corp.*, Civil No. 70-539 (E.D. Ohio Nov. 2, 1972) (*Reed* does not overrule *Muller*).

days to five, women found that these laws, however "protective" in origin, were "protecting" them from better-paying jobs and opportunities for promotion. *See, e.g., Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Ridinger* v. *General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971); *Kober* v. *Westinghouse Electric Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971).

While *Muller* reflects constitutional interpretation in midpassage from *Lochner* to *Darby, Goesaert* v. *Cleary*, 335 U.S. 464 (1948), hardly exemplifies a first step toward enlightened change. It was retrogressive in its day and is intolerable a generation later. Unlike the "benign" classification upheld by the Court in *Muller*, the Michigan statute challenged in *Goesaert*, like the classification challenged here, was difficult to construe as a measure intended to assist women "in the struggle for subsistence" or to safeguard women's competitive position. The statute at issue in *Goesaert*, although it allowed women to serve as waitresses in taverns, barred them from the more lucrative job of bartender. Exception was made for the wives and daughters of male tavern owners. In contrast to the protective motive apparently present in *Muller*, the actual motivation behind the statute in *Goesaert* was said by the appellant to be "an unchivalrous desire of male bartenders to try to monopolize the calling." 335 U.S. at 467.[*] *See* E. Baker,

[*] *Cf. Truax* v. *Raich*, 239 U.S. 33, 41 (1915) (right to work without discrimination on grounds of race or nationality "is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure"); *Takahashi* v. *Fish and Game Comm'n*, *supra* (invalidating on equal protection grounds denial of fishing licenses to aliens ineligible for citizenship).

Protective Labor Legislation 444-56 (1925). Yet even the outright exclusion in *Goesaert* was tendered to this Court in a "protective" wrapping. The opinion below, 74 F. Supp. 735, 739 (E.D. Mich. 1947) (three-judge court) observed that "grave social problems" could be created by female bartenders, that male owners would be motivated to maintain "a wholesome atmosphere" when a wife or daughter tends bar, hence the statute constituted a "special provision for the protection of women."

The majority opinion in *Goesaert* reflects an antiquarian male attitude toward women—man as provider, man as protector, man as guardian of female morality. While the attitude is antiquarian, it is still indulged by judges who would automatically reject attribution of inferiority to racial or religious groups. *See* Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675 (1971).

Twelve years later, the Court appeared to step away from *Goesaert*. In *United States* v. *Dege*, 364 U.S. 51 (1960), it refused to rely on "ancient doctrine" concerning the status of women. The Court declared, "we . . . do not allow ourselves to be obfuscated by medieval views regarding the legal status of women," and rejected precedent from an earlier age expressing a view of womanhood "offensive to the ethos of our society." 364 U.S. at 52, 53.

Goesaert's sanction of "a sharp line between the sexes," however, has not been reassessed by this Court. On the contrary, the Court cited *Goesaert* with seeming approval as recently as 1970. *See Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). But enlightened jurists in federal and state courts have found *Goesaert* a burden and an embarrassment. They politely discard it as precedent, refusing "to be obfuscated by medieval views regarding the status of

women." *See Sail'er Inn, Inc.* v. *Kirby, supra; Paterson Tavern & Grill Owners Ass'n* v. *Borough of Hawthorne, supra; Seidenberg* v. *McSorleys' Old Ale House* and *Bennett* v. *Dyer's Chop House, supra.*

This survey of pre-*Reed* precedent not squarely addressed by the Court in its *Reed* opinion appropriately ends with *Hoyt* v. *Florida*, 368 U.S. 57 (1961), in which the court again perceived a sex-based classification as "benign." In *Hoyt*, the Court sustained a Florida statute limiting jury service by women to those who registered with the court their desire to be placed on the jury list. Observing that "woman is still the center of home and family life,"[10] the Court concluded that the Florida legislature had not transgressed constitutional limitations by according her advantaged treatment: she had the right, but not the obligation to serve.

Special treatment of women as jurors was no advantage to defendant Hoyt whose crime was committed after an altercation in which she claimed her husband had insulted and humiliated her to the breaking point.[11] Nor is the classification "benign" for women generally. For example, in a 1970 decision a New York trial court rejected the challenge of a female plaintiff to a jury system with automatic exemption for women. As a result of this exemption, women constituted less than twenty percent of the available pool. In his published opinion, the judge relied on *Hoyt* to explain to the complainant that she was "in the wrong forum." Less

[10] 368 U.S. at 61-62; *cf. Leighton* v. *Goodman*, 311 F. Supp. 1181, 1183 (S.D.N.Y. 1970).

[11] Empirical studies support the hypothesis that men jurors tend to favor men, while women jurors tend to favor women. *See* Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171, 192-97 (1971).

chivalrous than this Court, but more accurately reflecting the impact of the stereotype, the judge stated that plaintiff's "lament" should be addressed to her sisters who prefer "cleaning and cooking, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems . . . ." *De Kosenko* v. *Brandt*, 63 Misc. 2d 895, 898, 313 N.Y.S.2d 827, 830 (Sup. Ct. 1970). *See also Goldblatt* v. *Board of Education*, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968) (regulation authorizing full salary less jury fees for male, but not female teachers was "reasonable" because a woman could avoid jury duty by claiming exemption).

In 1972, this Court declined an invitation to review the constitutionality of a Louisiana statute limiting jury service by women to volunteers. The Court observed that "nothing in past adjudications [suggests] that [the male] petitioner has been denied equal protection by the alleged exclusion of women from grand jury service." *Alexander* v. *Louisiana*, 405 U.S. 625, 633. A short time later, the Court ruled that proof that blacks had been systematically excluded from state grand and petit juries that indicted and convicted a white defendant would entitle the white defendant to federal habeas corpus relief, even if he could not show he was harmed by the exclusion. *Peters* v. *Kiff*, 407 U.S. 493 (1972). The inference might well be drawn that full participation by women in community affairs is not yet recognized as a value worthy of "protection" in the interest of society.[22] *See* Johnston & Knapp, *supra*, 46 N.Y.U.L. Rev. at 718-21.

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[22] *Compare State* v. *Hall*, 187 So. 2d 861, 863 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966) ("The legislature has the right to exclude women so they may continue their service as mothers, wives

In 1971, two legal scholars—both of them male—examined the record of the judiciary in sex discrimination cases. They concluded that the performance of American judges in this area "can be succinctly described as ranging from poor to abominable. With some notable exceptions . . . [judges] have failed to bring to sex discrimination cases those virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. . . . Judges have largely freed themselves from patterns of thought that can be stigmatized as 'racist' . . . . [But] 'sexism'—the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences—is as easily discernible in contemporary judicial opinions as racism ever was." Johnston & Knapp, *supra*, 46 N.Y.U.L. Rev. at 676 (1971).

While a new direction has been signalled in some of the state and lower federal courts, and in this Court's opinions in *Reed*, *supra*, and *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the need for clear statement of the appropriate review standard is evident. *Amicus* urges that designation of sex

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and homemakers and also to protect them . . . from the filth, obscenity and noxious atmosphere that so often pervades a courtroom during a jury trial."), *with Abbott* v. *Mines*, 411 F.2d 353, 356 (6th Cir. 1969) ("It is common knowledge that society no longer coddles women from the very real and sometimes brutal facts of life. Women, moreover, do not seek such oblivion.").

Despite *Hoyt*, state legislation concerning jury duty has progressed toward recognition that service is a responsibility shared equally by all citizens, male and female alike. By 1970, the majority of states (including Florida) either treated women and men on the same basis, or relieved women only when family duties in the particular case warranted exemption. *See* Hearings on S. J. Res. 61 before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 725-27 (1970).

as a suspect classification is overdue, provides the only wholly satisfactory standard for dealing with the claim in this case, and should be the starting point for assessing that claim.

III.

The challenged classification is not justified by administrative convenience, the primary rationale relied on by the majority below.

A. *The challenged classification does not result in substantial economies.*

The majority below considered it

> clear that the reason Congress established a conclusive presumption in favor of married servicemen was to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. 341 F. Supp. at 207 (J.S. at 10a).

The majority further stated:

> Congress apparently reached the conclusion that it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members. 341 F. Supp. at 207 (J.S. at 11a).

The assumption underlying the classification, and the defense of it offered below, is evident: nearly all women married to men in the military are financially dependent upon their husbands. Significantly, the statutes at issue de-

fine "dependent" as a person whose own income does not cover half of that person's expenses. It is not at all clear that nearly all women married to servicemen fall in this category.

In 1971, 43% of all women over the age of 16 were in the labor force, 18% of all women worked full-time the year round, and almost 60% of all married women living with their husbands were gainfully employed.[13] The historical trend has been dramatically upward and further increases in labor force participation by women are expected.[14] It is likely, then, that many married women earn enough to cover more than half of their own living expenses.[15] Such women would not qualify as "dependents" under the above criterion. Thus, it may well be that if servicemen were asked to prove the dependency of their wives, the resultant savings in benefits paid would be far greater than the cost of processing applications for benefits. Assuming vigorous enforcement, as is now the case with respect to servicewomen's applications, a high percentage of non-eligible servicemen would not bother to apply, thereby reducing the application processing burden that so impressed the majority below.

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[13] U.S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment & Education 1 (W.B. Pub. No. 72-191 Mar. 1972).

[14] Travis, The U.S. Labor Force: Projections to 1985, 93 Monthly Labor Rev., May 1970, 3, Table 4 at 8.

[15] Note that under the statutory definition this need not mean that the wife earns more or as much as the husband. In the case at bar, for example, an income of only $2820 a year (Joseph Frontiero's) is enough to disqualify a spouse as a dependent. Many working women have substantially larger incomes. In 1970, for example, the median income for full-time women workers was $5,323. U.S. Women's Bureau, Dept. of Labor, Fact Sheet on the Earnings Gap 1 (rev. Dec. 1971).

But neither the armed forces nor the congressional committees involved ever have investigated whether the current arrangement does in fact effect any saving.[16] Moreover, it is unlikely that Congress would require servicemen to prove dependency of their wives even if such a requirement would result in substantial economies. As the legislative history of these statutes reveals, the dominant purpose of Congress was to provide an incentive for married persons to choose a military career by offering benefits comparable to those available in civilian employment.[17] The absence of any effort to determine whether the supposed economy of the present arrangement is real suggests that the principal reason for the distinction is not administrative convenience but the stereotypical notion that the husband, whatever his actual income, ought to be treated as principal family breadwinner.

While there is no evidence whatever supporting the economic prop for the challenged classification—that it costs less to grant benefits for wives than to require proof of dependency—it is undisputed that the relief sought by appellants, equalization of fringe benefits for married military personnel regardless of sex, would result in no increase in budget requirements of the Department of Defense.[18]

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[16] *See* appellees' answers to appellants' interrogatories Numbers 1 and 2, Single Appendix at 43-44.

[17] *See* pp. 63-65 *infra*.

[18] *See* S. Rep. No. 92-1218, 92d Cong., 2d Sess. 2 (1972).

B. Dissimilar treatment for men and women who are similarly situated cannot be justified by characterising the benefits here at issue as a "privilege" or a "windfall."

The challenged provisions establish a blatantly discriminatory sex line: all servicemen whose wives earn more than half of their own living expenses are eligible for benefits; all servicewomen whose husbands earn more than half of their own living expenses are ineligible for benefits. The serviceman so situated cannot be denied benefits; his female counterpart cannot obtain them.

Characterization of the benefits at issue as a "privilege" does not reduce the government's obligation to distribute them with an even hand. While the government is not obliged to provide these fringe benefits, once it chooses to do so, the fifth amendment's guarantee of evenhanded application of the laws forbids arbitrary line drawing. *See Moritz* v. *Commissioner of Internal Revenue, supra* ("The concept that constitutional rights turn on whether a Governmental [*sic*] benefit is characterized as a right or a privilege has been emphatically rejected. *See Morrissey* v. *Brewer*, 408 U.S. 471, 481; *Graham* v. *Richardson*, 403 U.S. 365, 374; *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n.6"); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1454-57 (1968).

Nor does characterization of Lt. Frontiero's complaint as a claim for "a windfall" avoid the collision with fundamental constitutional principle. Male members of the armed forces with non-dependent wives cannot be denied the "windfall." Similarly situated female members are no less deserving.

Men and women alike are attracted to military service because it offers them occupational training, travel opportunity and security. For many young persons of both sexes, service careers provide the break they need "to escape a lifetime on the margin." [39] For the married woman, however, the economic viability of a service career is impaired in a way it is not for the married man. Denial of fringe benefits to women and automatic provision of them to men underscores for the woman in military service her second class status. This reality is not disguised by telling her that "windfalls" and "privileges" are reserved for men.

C. ***This Court and lower federal courts have rejected administrative convenience as a justification for discriminatory sex-based classifications.***

In *Reed* v. *Reed, supra,* the Court held unconstitutional a state statute providing that, as between persons equally entitled to administer an estate, "males must be preferred to females." The principal justification for the challenged provision was administrative convenience—the avoidance of a class of contests and, thereby, reduction of the probate court's workload. In rejecting this justification, Mr. Chief Justice Burger, writing for a unanimous Court, stated:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. . . . [But t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind

[39] Phillips, On Location with the WACS, Ms., Nov. 1972, 53, 55.

of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. 404 U.S. at 76.

As Judge Johnson stated in his dissent in the case at bar:

> The basic message which comes from [the *Reed* case] is that administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality. 341 F. Supp. at 211 (J.S. at 20a).

In the case at bar, as in *Reed*, acceptance of the administrative convenience rationale would require approval of sex-role stereotyping as a legitimate basis for legislative distinction.[20] As this Court has recognized, resort to group stereotype as a basis for legislative line-drawing is wholly at odds with the principle of equality of individuals before the law. In *Stanley* v. *Illinois, supra,* decided two days before the decision by the court below but apparently not considered by that court, this Court declared unconstitutional legislation based on the administratively convenient assumption that unwed fathers are unsuitable and neglect-

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[20] *Cf. Hoyt* v. *Florida, supra; Forbush* v. *Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972), both invoking "administrative convenience" to justify provisions alleged to discriminate invidiously on the basis of sex. *Hoyt* v. *Florida* involved a statute requiring women to come forward and volunteer if they wished to be placed on the jury list. The *Hoyt* statute might have been viewed as according women advantaged treatment, if the Court overlooked the implication for an adult person of exemption from civic responsibility. *See* pp. 41-42 *supra*. *Forbush* involved a married woman's right to retain her birth name. The lower court stressed the accessibility to plaintiff of a change of name procedure; reasoning that Ms. Forbush had a "simple, inexpensive means" of achieving her objective, the court characterized her injury as *de minimis*. For a different appraisal of the character of the interest asserted in *Forbush, see Stuart* v. *Board of Supervisors*, No. 105 (Ct. App. Md. Oct. 9, 1972).

ful parents. In *Stanley*, as in the instant case, the barrier was not "insurmountable," for under the legislation at issue there an unwed father could affirmatively prove his qualification in an adoption or guardianship proceeding. But the Court held that he should not be subjected to a standard of proof more onerous than that applicable to other parents. 405 U.S. at 658.

Most recently, the Court of Appeals for the District of Columbia[21] rejected the argument that avoidance of administrative difficulties justified denial of medical benefits to children born to unmarried members of the armed forces. In striking down this classification (included in 10 U.S.C. Section 1072, one of the sections challenged in the case at bar),[22] the court stated:

> While the Government may legitimately attempt to conserve its fisc, it may not accomplish that goal by drawing invidious classifications.

D. *Congressional equalization of benefits paid to or for the "dependents" of male and female employees of the federal government demonstrates the administrative feasibility of equal treatment and congressional concern that sex-based discrimination be ended.*

In December, 1971, Congress amended Title 5 of the United States Code "to provide equality of treatment for married women federal employees with respect to [veteran's] preference, eligible employment benefits, cost of living allowances in foreign areas, and regulations concern-

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[21] *Miller* v. *Laird*, Civil No. 752-71 (D.D.C. Aug. 31, 1972) (three-judge court).

[22] The same distinction between children born to married parents and children born out of wedlock appears in 37 U.S.C. Section 401, the housing allowance provision challenged in the instant case.

ing marital status generally."[*] This legislation, covering all employees of the federal government except members of the uniformed services, added the following subparagraph to 5 U.S.C. Section 7152:

> (c) Notwithstanding any other provision of law, any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

This provision had the following effects: (a) it equalized the dependency tests under 5 U.S.C. Section 8133 for payment of death benefits to widows and widowers of federal employees dying from injury sustained in the performance of duty. Previously, widows were entitled to benefits if they were "living with, or dependent for support on the decedent at the time of his death or living apart for reasonable cause or because of desertion." 5 U.S.C. Section 8101(6). A widower, however, was entitled to benefits only if, "because of physical or mental disability, [he] was wholly dependent for support on the employee at the time of her death." 5 U.S.C. Section 8101(11); (b) it equalized the dependency tests under 5 U.S.C. Section 8110 for payment of augmented compensation to dependents of disabled federal employees. Previously, a wife was eligible for augmented compensation if she lived in the same household as the employee or received regular contributions from him, or if he was under court order to contribute to her support. A husband was eligible for augmented compensation only if he was wholly dependent on the employee for support because of physical or mental disability.

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[*] P.L. 92-187, 85 Stat. 644.

In January, 1971, Congress amended 5 U.S.C. Section 8341[45] which defines persons qualified for Federal Civil Service survivors' annuities. A surviving widow qualified automatically, but a surviving widower qualified only if he was incapable of self-support because of mental or physical disability and received more than half of his support from his wife. The amendment gave widowers the same automatic qualification as widows. The House Committee Report states the reason for the amendment:[46]

> In the Committee's judgment, the present provision is discriminatory in that it runs counter to the facts of current-day living, whereby the woman's earnings are significant in supporting the family and maintaining its standard of living. Accordingly, the bill removes the dependency requirements applicable to surviving widowers of female employees, thus according them the same treatment accorded widows of deceased male employees.

In December, 1971, Congress amended 5 U.S.C. Section 2108,[47] which defines persons eligible for veterans preference in the federal civil service. Previously, the "unmarried widow," but not the "unmarried widower," of a veteran, and "the wife," but not the husband, of "a service-connected disabled veteran" meeting certain other requirements were eligible. The amendment made widowers and husbands eligible under the same conditions as widows and wives.[48]

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[45] P.L. 91-658, 84 Stat. 1961.

[46] H.R. Rep. No. 91-1469, 91st Cong., 2d Sess., 1970, U.S. Code Cong. & Ad. News, Vol. III, 5931, 5934.

[47] P.L. 92-187, 85 Stat. 644.

[48] The amendment leaves unchanged provisions granting a preference under certain circumstances to mothers but not fathers of veterans.

In the same act, Congress amended 5 U.S.C. Section 5924 which provides cost of living allowances to dependents of federal employees living in a foreign area. The allowance, previously payable to "the employee's wife or his dependents or both," was made payable to "the employee's spouse or dependents, or both."

In October of this year, Congress amended 38 U.S.C. Section 102(b) which defines the term "dependent" for the purpose of determining the amount of the education assistance allowance armed forces veterans are eligible to receive.[*] A veteran with dependents, as defined, is eligible for a substantially higher allowance.[**] Section 102(b) previously provided that the wife of a male veteran was automatically classified as a dependent while the husband of a female veteran was classified as dependent only if he "is incapable of self-maintenance and is permanently incapable of self-support due to mental or physical disability; . . ." The amendment redefines "dependent" to include all husbands of eligible female veterans without regard to incapacity, thus extending the statutory presumption of dependency as requested by *amicus* in this case.

Before amendment, the provisions noted above, like the statutes at issue in this case, imposed a test of actual dependency for husbands of female employees, but assumed the dependency and eligibility of the wives of male employees. The change in each case was to extend to husbands of female employees the automatic benefits already enjoyed by wives of male employees. The "administrative conven-

[*] P.L. 92-540, 86 Stat. 1074.

[**] 38 U.S.C. Section 1682.

ience" of prior arrangements was thus rejected as a justification for differentials in fringe benefits. Rather, the prior arrangements were recognized as "discriminatory," and inconsistent with "the facts of current-day living."

E. *Federal prohibitions of discrimination on the basis of sex by private and state employers forbid practices of the kind authorized by the statutes at issue in the case at bar.*

The Sex Discrimination Guidelines[70] issued by the Equal Employment Opportunity Commission (the "Commission") under Title VII of the Civil Rights Act of 1964, as amended,[71] are applicable to state and municipal governments or corporations and to all private employers with 15 or more employees. With regard to fringe benefits, the Guidelines provide:

> (a) "Fringe Benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.
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> (d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; . . . 29 C.F.R. Section 1604.9

The Guidelines thus explicitly proscribe differential treatment of men and women of the kind at issue in the case at bar. Moreover, they reflect consistent administrative and

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[70] 29 C.F.R. Sections 1604.1-1604.10.

[71] 42 U.S.C. Section 2000e-12.

judicial interpretation"[11] prior to the time the Guidelines formally issued. For example, in 1969 the Commission ruled[12] that there was reasonable cause to believe that a death benefit plan which provided an automatic pension for widows of male employees, but did not provide a pension for the widowers of female employees unless they were physically or mentally incapable of self-support was unlawful under Title VII. "Title VII of the Civil Rights Act of 1964," the Commission stated, "is intended to protect *individuals* from the penalizing effects of . . . presumptions based on the collective characteristics of a sexual group." *Id.* (Emphasis in the original.)

The Equal Pay Act,[13] 29 U.S.C. Section 206(d), has also been interpreted to prohibit the kind of sex-based classification at issue here. For example, the Wage and Hour Divi-

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[11] *See, e.g., Bartmess* v. *Drewerys U.S.A., Inc.*, 444 F.2d 1186, 1189 (7th Cir. 1971), *cert. denied*, 404 U.S. 939 (1971).

[12] EEOC Decisions, Case No. YNY9-034, CCH Emp. Practices Guide ¶6050 (June 16, 1969). *See* the following EEOC decisions ruling that unequal fringe benefits for men and women violate Title VII: Case No. CL7-6-694, CCH Emp. Practices Guide ¶6009 (May 19, 1969), Decision No. 70-510, CCH Emp. Practices Guide ¶6132 (Feb. 4, 1970), Decision No. 70-660, CCH Emp. Practices Guide ¶6133 (Mar. 24, 1970), and Decision No. 71-1100, CCH Emp. Practices Guide ¶6197 (Dec. 31, 1970) (all ruling unlawful employers and/or union health insurance plans providing for coverage of spouses of male but not female employees); Decision No. 70-513, CCH Emp. Practices Guide ¶6114 (Feb. 4, 1970) (payment of death benefits to surviving spouses of male but not female employees ruled unlawful); Decision No. 70-75, CCH Emp. Practices Guide ¶6049 (Aug. 13, 1969), Decision No. 71-562, CCH Emp. Practices Guide ¶6184 (Dec. 4, 1970), Decision No. 72-0702, CCH Emp. Practices Guide ¶6320 (Dec. 27, 1971) and Decision No. 72-1919, CCH Emp. Practices Guide ¶6370 (June 6, 1972) (all ruling unlawful different optional retirement ages and benefits for men and women).

[13] *See* 29 C.F.R. Sections 800.5-800.12 for the extent of coverage.

sion of the Department of Labor, which administers the Equal Pay Act, has ruled that insurance plans pursuant to which the employer pays the cost of insurance premiums for family coverage for married male employees but pays the cost of family coverage for married female employees only if they are actually the heads of their families violate the Act. W & H Opinion Letter No. 425, CCH Emp. Practices Guide ¶1208.52 (Feb. 11, 1966)."[75]

In addition to the non-discrimination obligations imposed by Title VII and the Equal Pay Act, employers holding contracts with the federal government are required to comply with Office of Federal Contract Compliance Sex Discrimination Guidelines[76] issued pursuant to Executive Order 11246, as amended.[77] Sanctions for failure to comply include cancellation of federal contracts held by the employer.[78] The Guidelines provide:

> The employer must not make any distinction based upon sex in employment opportunities, wages, hours or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not be considered to have violated those

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[75] *See* W & H Opinion Letter No. 420, CCH Emp. Practices Guide ¶1208.591 (Feb. 11, 1966) (insurance plan permitting male employee to insure spouse whether or not she is working but not permitting female employee to insure spouse found unlawful); W & H Opinion Letter No. 388, CCH Emp. Practices Guide ¶1208.59 (Oct. 14, 1965) (employer paid insurance plan providing family hospitalization coverage for male but not female employees found unlawful).

[76] 41 C.F.R. Sections 60-20.1-20.6.

[77] 3 C.F.R. Section 339.

[78] 41 C.F.R. Sections 60-1.26-1.32.

guidelines if his contributions are the same for men and women or if the resulting benefits are equal. 41 C.F.R. Section 60-20.3(c).

Thus, private employers, as well as state and municipal employers are instructed by federal authority that, whatever administrative convenience may result, differentials of the kind at issue here cannot stand. The discrimination such practices work against individual female employees is wholly at odds with the national commitment to eradicate sex-based discrimination.

F. Summary and conclusion: The discrimination against women mandated by the challenged classification is neither (a) supported by a compelling state interest; (b) necessary to the accomplishment of legitimate legislative objectives; nor (c) reasonably related to a permissible legislative objective.

If, as *amicus* urges, the challenged sex-based classification is declared "suspect", this Court must consider whether a compelling state interest justifies the discriminatory practices embodied in the challenged provisions. The basic objective of the system of dependents' benefits is to attract and retain qualified personnel in the armed forces.[79] There is no evidence that Congress believed that it was serving "a compelling state interest" by treating women differently from men[80] and, as demonstrated in the discussion above,[81] none is so served.

Convenience and simplicity, while grand virtues in the administration of public affairs, do not supersede the

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[79] *See* pp. 63-65 *infra*.

[80] *Id.*

[81] *See* pp. 44-57 *supra*.

fundamental right of individuals to the equal protection of the law. Thus, such obviously convenient measures as restricting the ballot to "two old, established parties" (*Williams* v. *Rhodes*, 393 U.S. 23 (1968)), denying welfare payments to persons with less than a year's residency in the state (*Shapiro* v. *Thompson*, 394 U.S. 618 (1969)), and denying the right to vote in state elections to persons with less than a year's residency in the state (*Dunn* v. *Blumstein*, 405 U.S. 330 (1972)), did not survive measurement against the constitutional equal protection principle.

Dunn v. *Blumstein* involved governmental interests more substantial than administrative convenience. Yet the various reasons offered by the state in that case, even in combination, were found insufficient to overcome the heavy burden required by this Court.

In that case the state of Tennessee sought to justify its one-year residency requirement on two grounds: (1) to "insure purity of ballot box—protection against fraud through colonization and inability to identify persons offered to vote, and (2) [to] afford some surety that the voter has, in fact, become a member of the community and that as such, he [or she] has a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his [or her] right more intelligently." 405 U.S. at 345 (citing Appellant's Brief at 15).

The Court implied that either or both of these reasons might constitute a legitimate government objective. 405 U.S. at 343-44. And Mr. Chief Justice Burger in his dissent stated explicitly that the one year residency requirement was "reasonable." He objected to the application by the majority of the "compelling state interest" standard. 405 U.S. at 363-64.

Thus while the reasons advanced by the state in *Dunn* v. *Blumstein* might be considered "rational," this Court concluded that, even in combination, they were not "compelling." In contrast to the relatively serious reasons asserted to save the Tennessee statute in *Dunn* v. *Blumstein*, the justification advanced here—administrative convenience—falls far short of a "compelling" interest when appraised in light of the interest of the class against which the statutes discriminate—an interest in treatment as full human personalities. As this Court said in *Williams* v. *Illinois*, 399 U.S. 235, 245 (1970), "the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo."

Thus, if sex is a "suspect classification," the federal interest in limiting application processing or, alternatively, saving benefits that would be due to women if they were accorded the same fringe benefits as men, cannot justify rank discrimination against a person, solely because she is female.[22]

If the Court concludes that sex is not a suspect classification, or determines not to reach that question, *amicus* urges application of an intermediate test. In part because of decisions of this Court,[23] women continue to receive disadvantaged treatment by the law. In answer to the compelling claim of women for recognition by the law as full human personalities, this Court, at the very least, should apply a test similar to the one delineated by Chief Justice

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[22] *Cf. Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Although *Shapiro* applied the stringent "compelling state interest" test to a state's one-year residence requirement for welfare benefits, the Court indicated that the statutory classification would fall even under the rational basis test. *Id.* at 638.

[23] *See* pp. 34-44 *supra*.

Burger in *Bullock* v. *Carter*, 405 U.S. 134 (1972). Regulations that disadvantaged women should be "closely scrutinized" with the burden on the proponent of the discriminatory action to establish that the sex-based classification is "necessary to accomplishment of legitimate [legislative] objectives." 405 U.S. at 144. *Cf. Weber* v. *Aetna Cas. & Sur. Co., supra; Miller* v. *Laird, supra.*

Yet the discrimination embodied in 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 is so patently visible that the statute is readily assailable under the less stringent reasonable-relationship test. The exclusion of women from benefits to which similarly situated men are automatically entitled lacks the constitutionally required fair and substantial relation to a permissible legislative purpose and therefore must be held to violate the equal protection clause. *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920); *Gulf, Colorado & S. F. Ry.* v. *Ellis*, 165 U.S. 150, 155 (1897).

First, as shown above, it is not at all clear to what extent, if any, the challenged classification in the case at bar in fact conserves the federal fisc.[84] Second, administrative convenience has been rejected by this Court as a justification for sex-based classifications even under the rational relationship test.[85] Third, Congress and the Executive, in light of society's increasing awareness of the unfairness and waste of human resources engendered by sex-based discrimination, have prohibited state and municipal governments, nearly all private employers, and federal agencies other than the uniformed services from engaging in the discriminatory employment practice challenged in

[84] *See* pp. 44-46 *supra.*

[85] *See* pp. 48-50 *supra.*

the case at bar. These comprehensive prohibitions clearly indicate that, in the view of Congress and the Executive, equal treatment of male and female employees for fringe benefit purposes is administratively feasible and, at this stage in our nation's history, a key element of equal employment opportunity policy.

The structure and mission of the armed forces are admittedly unique. But no suggestion has been made, nor does it appear, that, with regard to the benefits at issue here, equal treatment of men and women is more difficult to achieve in the armed forces than in private and other public employment. Rather, the discrimination embodied in 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 reflects the very different legislative and judicial perspective current in 1949 and 1956 when these provisions were enacted. At that time, equal employment opportunity for women was not a matter of legislative concern, and an unbroken line of precedent from this Court indicated that legislative lines drawn on the basis of sex, however "sharp," would be tolerated by the judiciary.

In view of the significant changes in the social and legal climate that have occurred since enactment of these provisions, it should be plain that the discriminatory practice countenanced by the challenged laws is no longer constitutionally tolerable. Equal pay must be an obligation in the military as it now is in all other areas of employment. Surely, there is no rational basis for exempting the military from the requirement that similarly situated male and female employees receive the same compensation. As Judge Johnson observed in his dissent below, it is "incongruous to say that the justification for denying the benefits [to women] is that it is cheaper not to give them. . . . If

all that is required to uphold a congressional enactment is the conclusion that it is more economical to deny benefits than to extend them, then any statutory scheme can be established and no disqualified group can complain." 341 F. Supp. at 210-11 (J.S. at 19a).

IV.

Upon determining that 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 as now limited violate the fifth amendment, the Court should, consistent with the dominant statutory purpose, remedy the defect by extending to female members of the armed forces the same benefits now available to similarly situated male members.

When a statutory provision denies equal protection by establishing an unconstitutional classification, a court may remedy the defect either by declaring the provision equally operative upon all persons similarly situated, or by declaring the provision inoperative as to all of them. *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). With respect to 10 U.S.C. Sections 1072 and 1076, and 37 U.S.C. Sections 401 and 403, the court below thought it would face a "Hobson-like choice" in fashioning a remedy if it determined that the sex classification did not comport with equal protection principles. Should it extend housing and medical benefits to the husbands of servicewomen, or should it require servicemen to prove actual dependency of their wives? In deciding whether the benefits should be extended, or the limitation made applicable to men, the Court must be responsive to the dominant legislative purpose. *See Moritz* v. *Commissioner of Internal Revenue, supra.*

The legislative history of the housing allowance provision, enacted in 1949,[35] and the medical benefits provision, enacted in 1956,[37] indicates that both provisions were designed to induce qualified personnel to remain in the uniformed services. In both 1949[38] and 1956[39] retention of skilled personnel presented a serious problem for the armed forces in face of the higher wages and fringe benefits offered by private industry. Congressman Kilday, the sponsor of both the housing allowance and medical benefits bills in the House, noted in support of the medical benefits bill that its purpose was to put the armed forces "on a competitive basis with business and industry" in the area of fringe benefits, so as to attract "career personnel" through reenlistment. 102 Cong. Rec. 3850 (1956). With respect to the legislation including the housing allowance, Senator Chapman, a member of the Senate Committee on Armed Services and spokesman on its behalf for the legislation, stated:

> [T]he purpose [of the bill] is to establish . . . a compensation pattern which will attract, and retain on a career basis, first-class men and women in the armed services . . . . 95 Cong. Rec. 13194 (1949).

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[35] Act of Oct. 12, 1949, ch. 681, 63 Stat. 764.

[37] Act of June 7, 1956, ch. 374, 70 Stat. 250.

[38] S. Rep. No. 733, 81st Cong., 1st Sess., 1949 U.S. Code, Cong. & Ad. News, Vol. 2 at 2089; 95 Cong. Rec. 7662 (1949) (remarks of Congressman Kilday); 95 Cong. Rec. 13194 (1949) (remarks of Senator Chapman).

[39] Senate Comm. on Armed Services, S. Rep. No. 1878, 84th Cong., 2d Sess., 1956 U.S. Code, Cong. & Ad. News, Vol. 2, 2698, 2699; 102 Cong. Rec. 3850 *et seq.* (1956).

> [T]he outmoded pattern which the services offered in the way of career compensation [is] a major deterrent to securing adequate numbers of qualified individuals for the postwar establishment. 95 Cong. Rec. 13195 (1949).

Nowhere in the legislative history of either bill does it appear that Congress wished to provide less in the way of fringe benefits to women, because it was unconcerned with retaining or encouraging reenlistment of female military personnel. On the contrary, Senator Saltonstall, ranking minority member of the Senate Armed Services Committee, speaking in support of the medical benefits bill, made it clear that enhancing the attraction of career service was the goal with respect to women as well as men:

> This single bill is not in itself an answer to all our manpower problems, of course. It does, however, to my mind, represent a long step forward toward the attainment of our objective, namely, the completely adequate defense of the United States not alone in terms of weapons and materiel but, more important, in terms of the *men* and *women* ready, willing, and able to devote themselves without interruption of career to the building up of the Nation's security. 102 Cong. Rec. 8043 (1956) (emphasis added).

Similarly, with respect to the housing allowance bill, Congressman Kilday and others spoke of the likelihood that trained personnel would be lost if adequate benefits were not paid[39] and Congressman Price explained:

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[39] 95 Cong. Rec. 7662 (1949).

> The United States Armed Services today are highly technical organizations geared to split-second timing and complex machinery. Each depends for efficient operation upon specially trained *men* and *women* (emphasis added). 95 Cong. Rec. 7671 (1949).

In view of the dominant congressional purpose—to increase the incentive for continued service by trained personnel—it is apparent that retention of a trained service*woman* is just as desirable and worth just as much in the way of additional benefits payments as retention of a trained serviceman. The fact that current practices call for more men than women in the armed forces has no bearing on this point. The cost of training a replacement for an individual skilled servicewoman is just as great as for an individual skilled serviceman.

The majority below thus misconceived the essential purpose of the legislation. To extend the housing and medical fringe benefits to married servicewomen, it stated, would abandon "completely the concept of dependency in fact upon which Congress intended to base the extension of benefits." 141 F. Supp. at 208 (J.S. at 12a). But in fact, extension of these fringe benefits to married servicewomen is consistent with the basic statutory objective of attracting and retaining skilled personnel. Moreover, there is nothing in the provisions at issue or their legislative histories indicating that unequal treatment of male and female members of the armed forces is a considered part of the overall statutory scheme, without which its purposes could not be accomplished. Finally, establishing equal treatment by limiting the benefits granted to wives of servicemen would significantly reduce the incentive value of these benefits for affected servicemen and thus would conflict with the primary

statutory objective. Under these circumstances, extension is the only suitable remedy.

Recently, women officers testified at hearings before the House Special Subcommittee on the Utilization of Manpower in the Military.[21] The Subcommittee Report stated, "the outstanding discrimination listed by these women officers is that part of section 401, title 37, U.S. Code, which provides . . . : 'A person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support.' . . . This results in a gross inequity for married military couples."

Each of the women officers testified that this section of the code was the greatest irritant and most discriminatory provision relating to women in the military service, . . ."[22] Thus, the statutory provisions challenged here have been and still are a significant impediment to the achievement of the express purpose of the fringe benefits authorized for married military personnel. For this reason as well, extension is the appropriate remedy.

Moreover, Congress has provided further unequivocal indications of its remedial preference. As discussed above,[23] Congress has eliminated sex-based differentials in fringe benefits available to civilian federal employees. In each case, it extended to women employees the more generous benefit provisions previously applicable only to men. Very recently, in a situation in which women received advantaged treatment, Congress extended the same advantages to men.

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[21] H.A.S.C. No. 92-51, 92d Cong., 1st & 2d Sess. 12439 (1972).

[22] Report of the Special Subcommittee on the Utilization of Manpower in the Military of the House Committee on Armed Services, H.A.S.C. No. 92-58, 92d Cong., 2d Sess., 14661-62 (1972).

[23] *See* pp. 50-54 *supra*.

See P.L. 92-603, Oct. 30, 1972, Section 104 (men and women retiring at age 62 entitled to the same social security computation formula). In the Equal Pay Act, *supra*, Congress provided expressly that an employer shall not effect the required equalization by reducing the wage of any employee. 29 U.S.C. Section 206(d)(1). Finally, as Judge Johnson noted in his dissent, the severability clauses of Titles 10 and 37 were enacted to relieve the judiciary "of the necessity of destroying the entire legislative framework in excoriating the discriminatory provisions." 341 F. Supp. at 211 (J.S. at 20a). *See also Moritz* v. *Commissioner of Internal Revenue, supra* (income tax deduction provision allowing parent care deduction to women, widowers and divorced men must be extended to cover never married men in view of the "[legislative] purpose and the broad separability clause in the act").

In light of the dominant legislative purpose, this Court's decisions should have made the appropriate resolution evident. For example, in *Levy* v. *Louisiana*, 391 U.S. 68 (1968),[*] *rehearing denied*, 393 U.S. 898 (1968) and *Weber* v. *Aetna Cas. & Sur. Co., supra*,[**] where dependency definitions singled out a certain group for unconstitutional treatment, the Court struck the offending exclusions or limitations, thus extending to the plaintiffs the benefits accorded

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[*] *Accord, Glona* v. *American Guaranty & Liability Ins. Co.*, 391 U.S. 73, *rehearing denied*, 393 U.S. 898 (1968); *Schmoll* v. *Creecy*, 54 N.J. 194, 254 A.2d 525, 529-33 (1969).

[**] *Weber's* equal protection holding was followed in cases challenging under the fifth amendment Social Security benefit differentials for children born of a marriage and children born out of wedlock: *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn. 1972); *Norris* v. *Richardson*, 346 F. Supp. 494 (N.D. Ga. 1972); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md. 1972); *Williams* v. *Richardson*, 347 F. Supp. 544 (W.D.N.C. 1972).

the larger group similarly situated. Nor is the propriety of extension of benefits a recent judicial discovery. As succinctly stated by Mr. Justice Brandeis over four decades ago in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931), the legislature eventually may decide to remove the benefit from all, but in the meantime, the Court must extend it to the unconstitutionally excluded class."

See also Hays v. *Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972) (extension of premium pay to men resolves conflict between Title VII and state law applicable to women only); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959, 969 (4th Cir. 1963) (en banc), *cert. denied*, 376 U.S. 938 (1964) (unconstitutional racially discriminatory provision pruned and remainder of statute declared effective); *Yale & Towne Mfg. Co.* v. *Travis*, 262 F. 576 (S.D. N.Y. 1919), *aff'd*, 252 U.S. 60 (1920) (tax exemptions granted by statute only to state citizens extended to citizens of other states); *Quong Ham Wah Co.* v. *Industrial Accident Commission*, 184 Cal. 26, 192 P. 1021 (1920), *appeal dismissed*, 255 U.S. 445 (1921) (workmen's compensation benefits extended to non-residents to cure constitutional infirmity); *Gates* v. *Foley*, *supra* (constitutionally infirm one-way consortium rule cured by extending recovery right to wives rather than removing it from husbands); *Burrow* v. *Kapfhammer*, 284 Ky. 753, 145 S.W.2d 1067 (1940), noted in 54 Harv. L. Rev. 1078 (1941) (plaintiff added to exempt class to cure unconstitutional exclusion); Note, 55 Harv. L. Rev. 1030 (1942).

" *Cf. Welsh* v. *United States*, 398 U.S. 333, 366 (1970) (Harlan, J. concurring):

> . . . there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals . . . .

With respect to the appropriate remedy, two recent decisions are directly in point: *Miller* v. *Laird, supra,* and *Moritz* v. *Commissioner of Internal Revenue, supra.* In *Miller* v. *Laird,* another differential embodied in the statutes challenged here was scrutinized and found wanting. Medical and housing benefits are authorized for a "legitimate" child, but not for a child born out of wedlock. 37 U.S.C. Section 401(2); 10 U.S.C. Section 1072(2)(E). *Miller* v. *Laird* was a class action seeking extension of medical benefits under 10 U.S.C. Section 1072 to children born out of wedlock to military personnel. The court did not hesitate to effect the necessary statutory repair. It eliminated the offending qualification—"legitimacy"—and declared plaintiff and the members of her class eligible for medical care. Defendants were permanently enjoined from refusing to register children of military personnel and from denying medical and dental care to them because of their birth status.

In *Moritz* v. *Commissioner of Internal Revenue, supra,* a never married man challenged his exclusion from a parent care deduction available to never married women. The court found the provision denying the deduction to men who have never married violative of the equal protection principle implicit in the due process clause of the fifth amendment. It then considered "whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverage of the statute," *id.* at 8, and concluded, in view of the dominant congressional purpose and the separability clause in the act, that "the benefit of the deduction . . . should be extended to the taxpayer," *id.* at 9.

Similarly, in the case at bar, the limitation on housing and medical benefits for the spouses of servicewomen should be pruned so that Lt. Frontiero will receive the fringe benefits automatically granted to similarly situated men.

CONCLUSION

For the reasons stated above, the decision of the district court should be reversed, the provisions of 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 which deny female members of the armed forces benefits and allowances available to similarly situated male members should be declared unconstitutional and the benefits and allowances available to male members of the armed forces under these sections should be made available on the same terms to similarly situated female members.

Respectfully submitted,

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